

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH HAMILTON,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2004

No. 247036

Wayne Circuit Court

LC No. 02-014333-01

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for felony-murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f, following a jury trial. Defendant was sentenced to life imprisonment without parole for the felony-murder conviction, two years in prison for the felony-firearm conviction, and 2 to 5 years in prison for the felon-in-possession conviction. We affirm.

This case arose when defendant and an accomplice, Derek Mixon, pulled guns on the surprised owner of a used car lot in his back office, forced him to the floor, and began searching him and the office for money. Searching the office's desk, defendant opened a drawer and found a handgun the owner had hidden under some papers. Defendant picked up the gun. At that moment, the owner's brother and partner returned from their nearby garage with a car, and asked defendant and Mixon why they were in the office. The owner's brother drew a gun, and a gunfight ensued between the brother and the two gunmen in the office. The gunfight left the brother dead and Mixon injured.

Defendant and Mixon left the scene in a car driven by their friend, Shawn Walker. Walker drove Mixon to the hospital, and police almost immediately suspected Mixon's involvement in the shooting. They brought Mixon in, and he confessed that he and defendant committed the robbery at the used car lot, but he claimed that he only shot at the victim once when his gun went off accidentally. Police arrested defendant and found gunpowder residue on the sleeves of his jacket. Police matched a bullet from the victim's chest with the gun defendant found in the drawer. At trial, Walker testified that he picked up defendant and Mixon from the scene, but Mixon testified that he robbed the used car lot with a man named "Mike."

Defendant first contends that the prosecutor improperly used Nixon's prior inconsistent statement to police as substantive evidence of defendant's guilt. In the alternative, defendant contends that his trial counsel was ineffective for failing to object to the prosecution's improper use of the prior inconsistent statement. We disagree.

The test of prosecutorial misconduct is whether the prosecutor's actions denied defendant a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Moreover, we will not reverse if the prejudicial effect of the prosecutor's comment could have been cured by a timely instruction. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). In this case, a timely instruction would have cured any possible prejudice caused by the prosecutor's incidental reference to the confession as direct evidence, because the issue turned on how the jury should interpret the evidence, not whether it could consider the confession at all. *People v Schutte*, 240 Mich App 713, 721-722; 613 NW2d 370 (2000). Therefore, we will not reverse on this basis.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under an objective standard of reasonableness and that the deficiency prejudiced the defendant. *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994). Defendant fails to demonstrate prejudice in this case, because overwhelming identification evidence linked him to the shooting irrespective of Nixon's statement to police. Walker, who pleaded guilty to accessory after the fact, testified that he gave a ride to both Nixon and defendant shortly after the shooting, and police found gun residue on the sleeve, front area, and pocket lining of defendant's blue jean jacket. Although the owner misidentified defendant in a lineup, he positively identified him in court. Also, the trial court provided a cautionary instruction pertaining to the proper use of the prior inconsistent statement within the jury instructions, and "jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because defendant fails to establish any prejudice from his trial counsel's performance, we find no reason to reverse his convictions.

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O'Connell  
/s/ Hilda R. Gage